

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

2/14 ORIGINAL To be submitted by
DAVID L. BIRCH
76-2121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JOHN CHIARELLO,

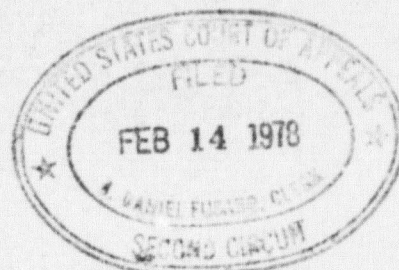
Plaintiff-Appellant,

- against -

EDWARD BOHLINGER, Correspondence Officer,
and KEVIN J. GALLAGHER, Librarian at
Green Haven Correctional Facility,

Defendants-Appellees.

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BRIEF FOR APPELLEES

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 Green Haven Correctional Facility, :
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 Defendants-Appellees, :
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BRIEF FOR APPELLEES

Statement

Plaintiff-appellant (hereinafter "Chiarello") appeals for an order of the United States District Court for the Southern District of New York (Pollack, J.) dated January 22, 1976, dismissing the complaint after trial. The Court's findings of fact and conclusions of law are set forth below at pp. 6-7.

Judgment was entered in favor of the defendants by the Clerk of the Court on January 27, 1976.

An earlier opinion of the Court denying defendants' motion to dismiss made pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) is reported at 391 F. Supp. 1153 (1975).

Question Presented

Has Chiarello shown that the findings of the District Court that he voluntarily withdrew his article and that the defendants did not suppress it are clearly erroneous?

Facts

Chiarello, then an inmate at Green Haven Correctional Facility, now incarcerated at Clinton Correctional Facility, alleged in this complaint, that the defendants, a correspondence officer and the librarian, deprived him of his First and Fourteenth Amendment rights by refusing to mail his article "Schizophrenia and the Monster" to a writing contest for prisoners sponsored by the P.E.N. American center.

Chiarello alleged that he sent his article to the correspondence room of Green Haven on November 14, 1974, that defendant Bohlinger read it, and after three days, forwarded it to defendant Gallagher, the librarian, who then kept it for fourteen days. Chiarello further alleged that Gallagher then told him the article was inflammatory and would have to be sent

to the other members of the Media Review Board.

In denying the defendants' motion to dismiss, the Court found (391 F. Supp. 1153) that although a correctional officer may in appropriate circumstances open or refuse to mail an inmate's material, an officer could not do so on his mere conclusion that the article is inflammatory. The Court ordered a trial.

The trial was held on January 22, 1976 before Judge Pollack. Chiarello was represented by two counsel. (T3)* He presented only his claim for damages (T4). He testified that he was convicted of second degree murder and was serving a sentence of 20 years to life (T6).

Chiarello's testimony about the incident in question essentially followed the allegations in this complaint. He testified that he sent his story to Bohlinger on November 14, 1974, that when on November 25, he asked Bohlinger for a receipt, Bohlinger responded that the story had not left the prison, (T5) and that he had forwarded it to Gallagher after holding it three days (T10).

Chiarello further testified that Gallagher told him he did not approve of the story because it was inflammatory (T11) and that other members of the Media Review Committee would have

* Page references preceded by T refer to the trial transcript.

to read the story, a procedure that would take from one to six months (T12). Chiarello then claims he asked for the story back (T12).

Chiarello also testified that he made several other attempts to have Gallagher send the story (T13, 16) and spoke to Mr. Van Ben Schoten, the Director of Education who allegedly told Chiarello that his story was wierd (T13-16).^{*} Chiarello also stated that although he knew the contest deadline was in March, 1975, he took his story back in November, 1974 (T36-37).

Joseph McElroy, a Professor of English at Queens College testified on Chiarello's behalf about the nature of the story and its literary qualities (T42-50). He testified that he had read the first version of the story on December 1, 1975 (T42) when Chiarello attended his writing course at Green Haven (T44). McElroy suggested that the narrator of the story was schizophrenic (T43, see also T46).

On cross-examination, McElroy testified that Chiarello was not prevented from attending his class (T51), that no one at Green Haven kept the article from him (T51-52), that he had encouraged other inmates to read Chiarello's article, that it was on his schedule to be read aloud during the class (T53), and that there was no prison censor in the classroom (T54).

No other witnesses were presented by plaintiff on his direct case.

^{*} Plaintiff neither deposed Mr. Van Ben Schoten nor called him as a witness at trial.

Edward Bohlinger, the corrections officer in charge of the correspondence department (T56) testified he had received the article in question on November 14, 1974 (T56, 59) and that at 1:00 p.m. on that day he gave the article to school officials in charge since he had been told by the Superintendent and other officials that approval was needed before articles could be sent out of the prison (T56-57). Bohlinger had the article in his possession from four to four and one-half hours and never saw it again (T57).

Bohlinger also testified that two Administrative Bulletins and a memorandum in effect in November, 1974 required that inmate manuscripts be approved (T60-63).

Kevin J. Gallagher, the non-law librarian at Green Haven and Chairman of the Institutional Media Review Committee (T64-65) testified that one of the functions of the Committee was to review inmate manuscripts that were to be sent out (T65-66).

Gallagher further testified that he received the article around 2:00 p.m. on November 14, 1974 (T66), that he glanced at a couple of pages of it (T67) and that early the next morning Chiarello told him that he wanted the article back because he has missed the deadline (T67-68). Gallagher heard nothing more about the article until Chiarello instituted this

suit (T68). He never told Chiarello that the article was inflammatory or that it could not be sent out (T68). Gallagher also testified that the review process included an appeal to the Media Review Committee of the Department of Correctional Services.

In rebuttal, Chiarello called Frank Lott, also convicted of second degree murder (T79), who testified that he had submitted an article to P.E.N. in November, 1974 which was never received (T80-81).

The Opinion of the District Court

At the conclusion of the trial, the Court made findings of fact and conclusion of law pursuant to the Federal Rules of Civil Procedure, Rule 52(a) (T84-85):

"It is perfectly plain that the plaintiff has failed to prove by credible evidence the claims he has asserted herein on the facts as demonstrated by the writings.

"There was no refusal to mail, no disapproval or approval of the manuscript nor rejection thereof and no frustration of any opportunity to mail the manuscript.

"The defendant Bohlinger plainly had no function to perform other than to mail prisoner correspondence if authorized to be mailed by someone higher up, and he didn't get that authorization.

"The defendant Gallagher had no opportunity to consider, approve or disapprove and did not reject or refuse to transmit the article or to process it in the ordinary course.

"The procedure of the department which makes it perfectly plain that the institutional determination is not final and that the entire process going through Albany in the review of any particular article could have been accomplished comfortably within the period of the contest makes it clear that circumstances other than those claimed by the plaintiff existed, and I find that Chiarello voluntarily requested and received back his manuscript with knowledge that it had not been reviewed, approved or disapproved for mailing.

"The complaint is dismissed.

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"The forgoing shall constitute the Court's findings of fact and conclusions of law as required by Rule 52(a), Federal Rules of Civil Procedure.

"So ordered."

ARGUMENT

THE FINDINGS OF THE DISTRICT COURT THAT
CHIARELLO WITHDREW HIS ARTICLE AND THAT
THE DEFENDANTS DID NOT SUPPRESS IT ARE
NOT CLEARLY ERRONEOUS

The District Court's findings that the defendants had
neither refused to mail nor approved or disapproved of Chiarello's

article but "that Chiarello voluntarily requested and received back his manuscript" (T84-85) should not be set aside unless clearly erroneous, since the finding was made by the Court after a trial. Federal Rules of Civil Procedure, Rule 52(a); Lassiter v. Fleming, 473 F. 2d 1375 (2d Cir 1973) (per curiam).

The trial record makes abundantly clear that Gallagher and Bohlinger did not refuse to mail Chiarello's article. Chiarello demanded its return. He was the reason the article was not mailed out. That the District Court chose to credit the testimony of Bohlinger and Gallagher instead of that of Chiarello presents no cause for review by this Court.

There can be no doubt that prison officials in November, 1974 were permitted to review outgoing inmate material since "the legitimate government interest in the order and security of penal institutions justifies the imposition of certain restraints on inmate correspondence". Procunier v. Martinez, 416 US 396, 412-413 (1974); Morgan v. LaVallee, 526 F. 2d 221 (2d Cir. 1975); and cases cited in Procunier v. Martinez, supra, 416 US at 406-407; compare, Wolfish v. Levi, ____ F. 2d ____, Slip Ops. No. 618, 523 (January 24, 1978).

There is no question that the defendants acted in good faith in the performance of their duties. Wood v. Strickland, 420 US 308 (1975); Scheur v. Rhodes, 416 US 232 (1974).

The fact that Chiarello was required to present his article for review in no way violated his constitutional rights. That he himself then immediately demanded the return of his article certainly provides neither a ground for the awarding of damages against the two defendants nor the granting of injunctive relief.*

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DISMISSING THE COMPLAINT SHOULD
BE AFFIRMED IN ALL RESPECTS

Dated: New York, New York
February 10, 1978

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
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DAVID L. BIRCH
Assistant Attorney General
of Counsel

* In his decision denying defendants' motion to dismiss, the District Court found that the claim for injunctive relief was moot since the contest deadline had passed. 371 F. Supp. at 1154, note 3. Chiarello pursued only his damage claim at trial (T4). Thus, whether he was entitled to damages is the only proper issue on appeal.

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

DENISE LAGIGLIA , being duly sworn, deposes and
says that she is employed in the office of the Attorney
General of the State of New York, attorney for Defendants-Appellees
herein. On the 14th day of February , 1978 , he
served³⁹ the annexed upon the following named person :

MR. JOHN CHIARELLO
Clinton Correctional Facility
Dannemora, N.Y. 12929

Attorney in the within entitled proceeding by depositing
³ a true and correct copy¹⁰ thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by
the Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by him for that purpose.

Denise Lagiglia

Sworn to before me this
14th day of February , 1978

David P. Bui
Assistant Attorney General
of the State of New York